Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THREE SISTERS SPORTSWEAR CO., BEDFORD CUTTING MILLS, INC., THREE SISTERS APPAREL CORP., METROPOLITAN SWEATER INDUSTRIES, INC., UNITED KNITWEAR INDUSTRIES, INC., SKYLIGHT FASHIONS, INC., d/b/a SKYLIGHT TRADING, and 144 SPENCER REALTY CORP.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

On the Petition
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39 pp

Questions Presented

Whether the National Labor Relations Board's (the "Board's") failure to consider the effect of the passage of time between an employer's violations of Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), amounts to an abuse of the Board's remedial authority?

Whether, in view of the property interests implicated, the Board may authorize broad union access to an employer's plant premises without a clear showing of the necessity for such extraordinary relief?

Whether a separate real estate firm may be found liable for an employer's unfair labor practices on a single integrated enterprise theory, absent a showing that the independent corporate entity exercised joint control over labor relations with the offending employer?

List of Parties

Petitioners are Three Sisters Sportswear Co., Bedford Cutting Mills Inc., Three Sisters Apparel Corp., Metropolitan Sweater Industries, Inc., United Knitwear Industries, Inc., Skylight Fashions, Inc. d/b/a Skylight Trading, 144 Spencer Realty Corp., and United Knitwear Industries, Ltd. Respondents are the National Labor Relations Board, and the International Ladies' Garment Workers Union, AFL-CIO (the "ILG").[1]

Rule 29.1 Listing

There is no parent company or subsidiary to be listed pursuant to Rule 29.1.

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[1] The ILG was an intervenor below.

Table of Contents

Questions Presented i

List of Parties ii

Rule 29.1 Listing ii

Opinion Below 2

Jurisdiction 2

Constitutional and Statutory Provisions 3

Jurisdiction in the Court of Appeals 3

Statement of the Case 3

Statement of Facts 5

REASONS FOR GRANTING THE PETITION 11

Conclusion 22

Table of Authorities

Cases:

Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 92 S.Ct. 383 (1971) 22

Conair Corporation v. NLRB, 721 F.2d 1355 (D.C. Cir. 1983), *cert. denied sub nom*, 467 U.S. 1241, 104 S.Ct.3511 (1984) 14, 15

Local No. 627 International Union of Operating Eng. v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975), *aff'd on this issue per curiam sub nom*, 425 U.S. 800, 96 S.Ct. 1842 (1976) 20

N.L.R.B. v. Al Bryant, Inc., 711 F.2d 543 (1983) 20, 22

NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 76 S.Ct. 679 (1956) 4, 16-18

NLRB v. IMCO International Measurement & Control Co., Inc., 978 F.2d 334 (7th Cir. 1992) 20

NLRB v. S.E. Nichols, 862 F.2d 952 (2d Cir. 1988), *cert. denied*, 490 U.S. 1108, 109 S.Ct. 3162 (1989) 14, 15

Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 85 S.Ct. 876 (1965) 4, 20

Southland Knitwear, Inc. and Metropolitan Industries, Inc., 260 N.L.R.B. 642 (March 4, 1982) 8

Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803 (1984) 12

Teamsters Local 115 v. NLRB, 640 F.2d 392 (D.C. Cir. 1981) 12

Textile Workers of America, AFL-CIO v. NLRB, 475F.2d 973 (D.C. Cir. 1973) 13, 14

United Steelworkers of America v. N.L.R.B., 646 F.2d 616, 639 (D.C. Cir. 1981) 12

United Telegraph Workers, AFL-CIO v. NLRB, 571 F.2d 665(D.C. Cir.), *cert. denied*, 439 U.S. 827, 99 S.Ct. 101(1978) 19, 20

Statutes and Rules:

28 U.S.C. § 1254(1) 2

29 U.S.C. § 158(a)(1), (3) 2, 6

29 U.S.C. § 160(f) 3

No.: _____

In The

Supreme Court Of The United States

October Term, 1995

THREE SISTERS SPORTSWEAR CO., BEDFORD CUTTING MILLS, INC., THREE SISTERS APPAREL CORP., METROPOLITAN SWEATER INDUSTRIES, INC., UNITED KNITWEAR INDUSTRIES, INC., SKYLIGHT FASHIONS, INC., d/b/a SKYLIGHT TRADING, and 144 SPENCER REALTY CORP.,

Petitioners,

-against-

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit, denying the

petitioners' petition for review of an order of respondent National Labor Relations Board which found the petitioners jointly liable for a number of violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. § 158(a)(1), (3), and granting the respondent's cross-application for enforcement of its order.

Opinion Below

The Court of Appeals' judgment appears at PA: 1-3a.[2] The Court of Appeals' order denying petitioners' petition for rehearing and rehearing *in banc* appears at PA: 4a-7a.

Jurisdiction

The Court of Appeals entered judgment on April 28, 1995 (Buckley, Williams and Randolph, *per curiam).* On July 3, 1995, the Court of Appeals denied petitioners' timely petition for rehearing and rehearing *in banc.* This petition follows within 90 days of the Court of Appeals' denial of the petition for rehearing and rehearing *in banc.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[2] Numbers preceded by the letter "A:" refer to pages of the Joint Appendix submitted to the Court of Appeals. Numbers preceded by the letters "PA:" refer to pages of the appendix to this petition. Numbers preceded by the letter "E:" refer to those pages of the trial transcript that were annexed as exhibits to the Joint Appendix.

Constitutional and Statutory Provisions

Pursuant to this Court's Rule 14.1(f), the provisions involved in this petition appear verbatim at PA: 8a-10a. They are:

29 U.S.C. §§ 158 (a) (1), (3); 160(F)

Jurisdiction in the Court of Appeals

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction under Rule 15 of the Federal Rules of Appellate Procedure and pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f).

Statement of the Case

In this petition, we present three questions for this Court's review.

First, we ask the Court to review the propriety of the Board's failing to articulate its rationale for imposing extraordinary remedies upon an employer found to have violated the Act -- without considering the effects of an eight-year passage of time between violations. Well-settled principles of law dictate that the Board's authority is limited to imposition of remedial, as opposed to punitive, measures. Hence, we contend that the Board exceeds its authority where, as here, it fails to consider the effects of the considerable passage of time between violations of an employer and its purported predecessor, but nevertheless authorizes the most severe of available remedies for the petitioners' violations.

In addition, we contend that the Board presumptively infringes upon the employer's property interests in ordering an employer to afford a union broad plant access, without requiring a clear showing of the necessity for such relief. In this regard, this Court is respectfully asked to reaffirm the well-settled principles of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679 (1956), which, recognizing the significance of the employer's property interests, implicitly requires such an inquiry. Accordingly, this petition presents an opporuntity for the Court to establish the extent of the Board's burden where, as here, the remedy authorized by the Board so drastically implicates the employer's property interests.

Finally, we maintain that this Court should articulate the weight to be accorded each of four factors traditionally used by the Board to ascertain whether an independent corporate entity is a single integrated enterprise with an offending employer for purposes of assessing liability under the Act.[3] Absent a showing that an unrelated corporation and an offending employer exercised joint control over labor relations, single employer status should not be found. In this petition, we respectfully urge the Court to articulate the relative weight to be given each prong of the standard applicable to the single employer inquiry.

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[3] *See Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S.Ct. 876 (1965).

Statement of Facts

This petition for certiorari arises out of the Board's determination that Three Sisters,[4] a ladies garment manufacturing and production plant, committed certain unfair labor practices between late 1988 and 1991.

Three Sisters (also referred to herein as the "employer") operates its plant at 144 Spencer Street in Brooklyn, New York. The building, owned by 144 Spencer Realty Corp. ("Spencer Realty") since 1982, had previously been occupied by a group of now-defunct entities (collectively referred to as "Southland-Metro"),[5] which had also been involved in garment manufacturing.

Employees of Three Sisters and Bedford Cutting Mills, Inc. ("Bedford") were covered by a collective bargaining agreement with Local 17-18, United Production Workers Union ("Local 17-18"), which extended between March 19, 1987 to March 19, 1990. During this period, Local 17-18 had regular access to the plant, and, when necessary, vigorously pursued employee grievances. [A: 36]

In December 1988, the ILG commenced an organizing campaign at the Three Sisters plant. Among its

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[4] The petitioners stipulated that Three Sisters Sportswear, Inc. and Three Sisters Apparel Corp. (hereinafter "Three Sisters") were a single integrated enterprise. [A: 17]

[5] The Southland-Metro entities consisted of Southland Knitwear, Inc. and Metropolitan Industries, Inc. [A: 15]

other efforts, ILG representatives openly enlisted the support of Three Sisters employees, and freely distributed leaflets and other ILG literature to the employees on and near the plant's premises. [E: 52-53] Three Sisters' principal, Beirel Jacobowitz, did nothing to hamper the ILG's distribution of ILG literature on the premises. [E: 53-54, 57-58]

Thereafter, however, a series of conflicts between Three Sisters management and certain employees were attributed to Three Sisters' purported animus against the ILG. These conflicts ultimately gave rise to the unfair labor practice charges that led to the Board proceedings below.

The Hearings And The Board's Order

Hearings on the unfair labor practice charges against Three Sisters were held over the course of twenty-two days, between June 24, 1991 and February 25, 1992 before an Administrative Law Judge ("ALJ"). Thereafter, the ALJ's recommendation, issued on January 15, 1993 [A: 13], and was adopted as modified in certain respects by the Board. 312 N.L.R.B. No. 133 (September 30, 1993). [A: 210]

Among other things, the Board affirmed the ALJ's decision: *(i)* determining that all of the petitioners herein collectively are single employers with and/or alter egos of one another, as well as alter egos of their purported predecessors, Southland-Metro; *(ii)* finding that the petitioners committed a number of violations of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3); and *(iii)* imposing a wide range of extraordinary notice and access remedies. [A: 210-11]

Liability On The Single Integrated Enterprise Theory

For purposes of liability, the Board alleged that petitioners Bedford, Metropolitan Sweater Industries, Inc., United Knitwear Industries, Inc., United Knitwear Industries, Ltd., and Skylight Fashions, Inc. are jointly single employers with and/or alter egos of Three Sisters.

The complaint was subsequently amended to add Spencer Realty as a respondent, on the theory that Spencer Realty was also a single employer with the petitioners. [E: 534] In addition, the ALJ ultimately reached the question whether the petitioners' purported predecessors -- Southland-Metro -- were a single integrated enterprise with the petitioners. The ALJ reached this question solely for purposes of evaluating the propriety of the extraordinary remedies sought by the ILG.

A. Spencer Realty

Although all violations were purported to have involved Three Sisters' employees, Spencer Realty -- along with the other petitioners -- was found to be a single employer with and alter ego of Three Sisters, and hence liable for Three Sisters' unfair labor practices under the Act.

On the one hand, we concede that Three Sisters, Bedford, United, and Skylight Fashions are engaged in various -- albeit distinct -- aspects of the ladies garment business. On the other hand, however, Spencer Realty, formed in or before 1982, is a real estate property management firm, with no involvement whatsoever in garment production. [A: 15]

Spencer Realty owns properties at least four different sites, including the building in which the other petitioners are located. [E: 548-49] However, other than some level of common ownership by members of the Jacobowitz family,[6] Spencer Realty's principals were never demonstrated to have exercised joint control over labor relations of Three Sisters. Nevertheless, the Board affirmed the ALJ's findings that this independent corporate entity was a single integrated enterprise with the petitioners, and imposed joint liability accordingly.

B. Southland-Metro

The ALJ also devoted considerable time to evidence ostensibly establishing that the petitioners herein are alter egos of two purported predecessors Southland-Metro.

Southland-Metro, which had ceased operations in 1983, had also been owned in part by members of the Jacobowitz family and engaged in garment manufacture. Prior to the cessation of its operations, the Southland-Metro entities were found to have committed unfair labor practices, based upon activities alleged to have occurred not later than 1980. *Southland Knitwear, Inc. and Metropolitan Industries, Inc.,* 260 N.L.R.B. 642 (March 4, 1982).

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[6] Various Jacobowitz family members own interests in all of the petitioners. Jack Jacobowitz holds a majority interest in Spencer Realty, together with his son Abraham, who possesses a minority interest in the company. However, neither is involved in the day-to-day operations of any of the other petitioners.

Commencing on January 21, 1992, during the pendency of the *Three Sisters, et al.* proceedings, the ALJ conducted a separate hearing on certain unresolved issues concerning Southland-Metro. These remaining issues were ultimately resolved by settlement on or about March 13, 1992. [A: 16-17]

Nevertheless, the ALJ decided, in *Three Sisters, et al.,* to reach "the connection between Southland and Metropolitan and the [petitioners], in order to determine the propriety of the special remedies that Charging Party [ILG] has requested" against the petitioners. [A: 17] It did so, finding that Southland-Metro was, indeed, a predecessor of the petitioners.

The Remedies

In addition to the traditional cease and desist order and other restitutionary relief, the Board affirmed, with slight modification, a series of extraordinary access and notice remedies recommended by the ALJ. [A: 68-69, 211] Notwithstanding the fact that more than eight years had elapsed between violations, the findings concerning Southland-Metro's predecessor status plainly weighed heavily in the ALJ's equation, given that the ALJ imposed remedies typically reserved for the most hardened of recidivists.

The extraordinary access measures grant the ILG broad access for up to two years to the Three Sisters plant. Among the most extreme measures, the order requires Three Sisters: (1) to permit ILG representatives access to non-work areas of the plant for presentation of ILG views on unionization during non-work periods; (2) to give the ILG notice of any meeting at which the employer addresses the employees on union representation, permit

ILG representatives to attend, and give the ILG equal time and access to address the employees on the same question; and (3) prior to any scheduled election at the Three Sisters' plant, to afford the ILG the opportunity and access to the plant to deliver a 30-minute speech to employees on working time.[7]

Among the special notice requirements, Three Sisters is required to: (1) mail copies of the Board's Notice, which has been personally signed by Three Sisters' principal, to those employed during the period of the unfair labor practices; (2) post the Notice at the plant for sixty days; (3) publish the Notice in two newspapers of general circulation, twice weekly for four weeks. In addition, the order compels Three Sisters principal Beirel Jacobowitz to attend an assemblage of employees convened for a "public reading" of the Notice, to be read either by Jacobowitz personally or by a Board agent.

Review of the Board's Order

On March 3, 1994, the petitioners filed a petition for review of the Board's order in the United States Court of Appeals for the District of Columbia, and on March 21, 1994, the Board filed its cross-application for enforcement of the Board's order in the same Court. [A: 207, 214] Notwithstanding the punitive nature of the remedies imposed by the Board, and the paucity of rationale with respect to the most significant aspects of the Board's order,

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[7] In addition, the order requires Three Sisters to make available to the ILG the names and addresses of all employees, and grant the ILG access to bulletin boards and other places where notices to employees are customarily posted.

the Circuit Court disposed of petitioners' application and granted the Board's cross-application *without opinion.*

REASONS FOR GRANTING THE PETITION

Although we present three seemingly independent questions for the Court's review, each presents a common issue of great significance and requires that this Court clarify the scope of the Board's authority in imposing liability and crafting remedies under the Act. We respectfully submit that the outcome on the questions presented here underscores the necessity for this Court to circumscribe the limits of the Board's discretionary authority.

Indeed, under the circumstances of this case, the dangers of failing to define the scope of the Board's authority are self-evident: Not only has the Board grossly overreached the bounds of the Act's mandate to fashion remedies that are remedial (as opposed to punitive) in nature, but it has failed even to present a viable rationale for imposing the most harsh of these remedies.

In addition, in failing appropriately to weigh all factors determining the existence of a single integrated enterprise, the Board has impermissibly intruded upon intercorporate relations, the traditional domain of the states.

The Board's Failure To Consider The Effects Of The Passage Of Time Between Violations Of The Act Amounts To An Abuse Of The Board's Remedial Authority.

Southland-Metro's relationship with the petitioners weighed heavily in the equation in assessing the remedies

to be imposed upon the petitioners -- even though more than eight years had passed with no intervening violations.

However, given that such a considerable period of time had elapsed between violations of the Act, the passage of time between violations merited the Board's consideration. In failing even to consider this eight-year "clean period," the Board exceeded the scope of its authority and impermissibly imposed measures decidedly more punitive than remedial.[8]

More significantly, perhaps, the Board contravened the mandate of this Court, which requires that remedies fashioned by the Board "must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900, 104 S.Ct. 2803, 2813 (1984) (Citations omitted). In order to assure the Board's adherence to this standard, this Court should mandate that the passage of time between violations must be evaluated. *See United Steelworkers of America v. N.L.R.B.*, 646 F.2d 616, 639 (D.C. Cir. 1981) (Emphasis supplied) (In the case of a recidivist violator, the effect of the passage of time between violations must be evaluated).

Plainly, such a mandate is necessary given the Board's order imposing the harshest of remedies upon the petitioners here. For, the extraordinary measures invoked here are typically justified only under circumstances in which an employer has exhibited a long history of flagrant

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[8] *See Teamsters Local 115 v. NLRB*, 640 F.2d 392, 401 (D.C. Cir. 1981) ("the Board's powers are limited to remedial, and not punitive, orders").

and repeated violations -- a history of recidivism that the *ALJ himself* conceded was not present in this case.[9]

Plainly, the ALJ only reached the question of the petitioners' alter ego status with Southland-Metro *"in order to determine the propriety of the special remedies* that Charging Party [ILG] has requested" in connection with Three Sisters, *et al.* [A: 17 (Emphasis supplied)] However, *eight years* had elapsed between the misconduct committed by Southland-Metro and the wrongful acts alleged to have been committed by the petitioners. Nevertheless, no mention of the eight-year lapse was even made.

Yet it is plain that the ALJ indeed gave great weight to the violations of Southland-Metro, for it invoked unduly harsh and punitive measures typically reserved for the most hardened recidivists. In fact, the ALJ's approach illuminates the fundamental flaw in the Board's remedial order. Were Southland-Metro to be taken out of the equation, as it should have been, the ALJ, and the Board, in turn, would have had no legitimate basis for imposing the measures invoked here.

Indeed, the cases in which such extraordinary remedies were authorized are marked by a long and flagrant history of recidivism, requiring a multiplicity of charges by the Board typically spanning a period of many

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[9] Indeed, the ALJ explicitly stated that "[n]either the conduct here [n]or the frequency of the violations, approaches the record of *J.P. Stevens*." [A: 64 (Citation omitted)] The recidivist history of J.P. Stevens was examined by the District of Columbia Circuit in *Textile Workers Union of America, AFL-CIO v. NLRB,* 475 F.2d 973 (D.C. Cir. 1973).

years.[10] Moreover, resort to such extreme measures typically finds its justification in wrongful conduct on a grand scale, often affecting massive numbers of employees.[11] Finally, such cases typically involve a persistent pattern of direct involvement by top management, usually spanning a period of years and/or multiple locations.[12]

Here, by contrast, the violations, while serious if true, hardly approach the level and duration of pervasive

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[10] *See, e.g., Textile Workers of America, supra,* 475 F.2d at 974 (This Court had been "called upon to review the *twelfth in a series of orders* of the [NLRB], issued in what by now seems a quixotic attempt convince J.P. Stevens to respect the rights conferred on its employees by ... the [Act]"); *NLRB v. S.E. Nichols, Inc.,* 862 F.2d 952, 961 (2d Cir. 1988), *cert. denied,* 490 U.S. 1108, 109 S.Ct. 3162 (1989) (Referring to four prior Board decisions issued between 1972 and 1977, which "justified imposition of extraordinary access and notice remedies").

[11] *See, e.g., Conair Corporation v. NLRB,* 721 F.2d 1355, 1360 (D.C. Cir. 1983), *cert. denied sub nom,* 467 U.S. 1241, 104 S.Ct. 3511 (1984) ("Company conducted a series of unprecedented management-employee meetings in direct response to the Union's efforts").

[12] *See, e.g., S.E. Nichols, supra,* 862 F.2d at 955 (Top officers of company "aggressive[ly] campaigned against [ ] unionization," including meeting with groups of employees to discourage them from supporting the union); *Conair Corp., supra,* 721 F.2d at 1360-61 (Upper-level executives held multiple mass and small-session meetings with employees, warning of consequences of unionization).

and egregious misconduct in the foregoing circumstances. Most significantly, Three Sisters is more properly characterized as a "first offender" -- as opposed to a persistent J.P. Stevens-calibre recidivist -- because nearly eight years had elapsed between the instant proceeding and the misconduct in *Southland-Knitwear, supra.*

In sum, compared with the truly egregious and pervasive misconduct found in *Conair, S.E. Nichols,* and other authorities cited above, it is all but impossible to reconcile the Board's imposition of extraordinary measures here, rendering the Board's order hopelessly arbitrary. In order to ensure that the remedies fashioned by the Board are "sufficiently tailored to expunge only the *actual,* and not merely *speculative,* consequences of the unfair labor practices," *Sure-Tan, Inc. v. NLRB, supra,* 476 U.S. at 900, 104 S.Ct. at 2813, an explicit consideration of the passage of time between violations should be a necessary prerequisite to the Board's imposition of extraordinary measures.

The Board Must Meet Its Burden Of Making A Clear Showing Of The Necessity For Broad Union Access To An Employer's Plant.

A series of extraordinary measures requires the employer here to afford the ILG nearly unfettered access to the plant for a period of two years, even though no unique problems of union access were shown.[13]

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[13] The employer was never demonstrated to have intruded upon the ILG's leafletting efforts at its own front door. Indeed, the ALJ dismissed an allegation of unlawful surveillance. Moreover, as previously noted,

(continued...)

Moreover, the board did so without requiring, at minimum, a clear showing of the necessity for such broad plant access. Accordingly, absent such a clear showing, we contend that the broad access order authorized here should be deemed a presumptive infringement upon the employer's property rights.

Indeed, the outcome here directly affronts the principles in *NLRB v. Babcock, supra,* which acknowledged that access orders may run afoul of an employer's property rights. In this regard, the *Babcock* Court stated that:

> [The problem of plant access] is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. *Accomodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.* The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization.

NLRB v. Babcock, supra, 351 U.S. at 112, 76 S.Ct. at 684 (Emphasis supplied).

Although *Babcock* principles do not typically govern in cases granting union access as a remedial measure,

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[13](...continued)
Local 17-18 vigorously represented Three Sisters' and Bedford's employees' interests during the same period of time.

these principles nevertheless merit consideration where, as here, the Board utterly failed even to acknowledge the property interests involved. Given the significance of these property interests, we contend that this Court, in keeping with *Babcock*, should mandate that the Board sustain a heightened burden of making a "clear showing" of the necessity for such extraordinary relief, as a prerequisite for authorizing broad plant access.

Indeed, this heightened standard has previously been imposed upon the Board by the District of Columbia Circuit, stating that:

> Absent the necessity to counter these harmful consequences, access cannot be justified as a remedial measure and instead may directly affront the principles announced in [*NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679 (1956)]. As a result, before access may be imposed, it is critical that a clear showing be made that access is needed to reassure employees of the existence and vitality of protected legal rights.
>
> In granting access as a remedial measure, therefore, *a burden lies upon the Board to substantiate its conclusion that access is necessary* to offset the consequences of unlawful employer conduct.

United Steel Workers, supra, 646 F.2d at 639 (Emphasis supplied) (Remanding for appropriate clarification).

Here, however, the Circuit Court affirmed the Board's findings -- notwithstanding the fact that the Board

utterly failed to substantiate its conclusion that special access is necessary. The Board's order provided only that, "[w]e agree with the [ALJ] that these [special access] remedies are appropriate and necessary to dissipate the effects of the [petitioners'] flagrant and extensive unfair labor practices." [A: 210][14]

In sum, given the extraordinary scope of the access measures invoked and the breadth of property interests implicated, the Board must be required to make a clear showing of the necessity for such relief. Absent a mandate of this Court, the Board's discretionary authority will continue to run afoul of the principles espoused in *NLRB v. Babcock, supra.*

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[14] In this regard, the ALJ had stated, without exposition, as follows:

> Charging Party also requests a number of other special remedies providing for reasonable access to Respondents' premises and bulletin boards by the ILG in certain situations, plus supplying the ILG with names and addresses of their current employees. These remedies are traditionally provided by the Board, where as here, Respondents have engaged in flagrant and pervasive conduct rendering the possibility of fair election remote, and I find it appropriate to so recommend. (Citations omitted)

[A: 66]

Single Employer Status May Not Be Found Absent A Showing That The Independent Corporate Entity Exercised Joint Control Over Labor Relations.

This case also presents questions concerning the role of the Board in affecting the manner in which intercorporate relations are structured, and the extent to which the Board may intrude upon such relations.

Here, Spencer Realty, an unrelated corporate entity, was found to constitute a single integrated enterprise with the petitioners. However, such a finding of single employer status should not be found where, as here, the sole determining factor is common ownership. In so finding based upon the existence of a single factor, the Board exceeds its mandate to effectuate federal labor policy and inappropriately intrudes upon the state's overriding interest in the principles guiding corporations.

It is well-settled that, "[a]s in other areas of the law, corporations normally are treated as separate entities under the Labor Act." *United Telegraph Workers, AFL-CIO v. NLRB*, 571 F.2d 665, 667 (D.C. Cir.), *cert. denied*, 439 U.S. 827, 99 S.Ct. 101 (1978). Accordingly, "[t]he Board treats multiple corporations as a single employer *only* when it is established that the nominally separate corporations are in fact operated as a single integrated business enterprise." *Id.* (Emphasis supplied).

This Court has established the four criteria, used by the Board in determining whether separate entities are "sufficiently integrated to be treated as one": *(i)* interrelationship of operations, *(ii)* common management, *(iii)* centralized control of labor relations, and *(iv)* common

ownership or financial control. *Radio & Television Broadcast Technicians Local Union 1264, supra,* 85 S.Ct. at 877 (per curiam) (Other citations omitted); *see also N.L.R.B. v. Al Bryant, Inc.,* 711 F.2d 543, 551 (1983). Ultimately, single employer status depends on all the circumstances of the case and is characterized by absence of an "'arm's length relationship found among unintegrated companies.'" *Local No. 627 International Union of Operating Eng. v. NLRB,* 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd on this issue per curiam sub nom,* 425 U.S. 800, 96 S.Ct. 1842 (1976).

While no factor is dispositive, the Board typically stresses the first three factors, with particular emphasis on whether control of labor relations is centralized, "which tend to show 'operational integration.'" *Al Bryant, supra,* 711 F.2d at 551, *citing, inter alia, Radio & Television Broadcast, supra; see also NLRB v. International Measurement & Control Co., Inc.("IMCO"),* 978 F.2d 334, 340 (7th Cir. 1992) ("the Board acts within its discretion in treating as a single employer firms that operate as an integrated enterprise *and 'exert[] significant control over' the employees in question.*") (Emphasis supplied) (Citation omitted). On the other hand, common ownership, which is "necessarily a feature of any conglomerate organization," is not determinative where common control is not shown. *United Telegraph Workers, supra,* 571 F.2d at 667 (Citations omitted).

Nevertheless, as disclosed by application of the four criteria established by this Court, the Board determined that Spencer Realty was a single integrated enterprise by relying almost exclusively upon the existence of common ownership.

First, common management was not present. Spencer Realty minority owner, Abraham Jacobowitz, son of Jack, was not demonstrated to have exercised any management control over the operations of any of the other petitioners [E: 692-96] Indeed, Abraham was studying at a Yeshiva for all of the relevant time period. [A: 20] Similarly, Jack Jacobowitz played no role in the day-to-day operations of Three Sisters and Bedford, which were run by principals Beirel Jacobowitz and David Jacobowitz, respectively. [E: 496, 595-91, 599]

Second, there was no interrelationship of operations, for Spencer Realty plays no role whatsoever in the garment manufacturing industry, or in the purportedly interrelated functions of the other entities. Spencer Realty is an entirely distinct real estate property management firm that owns at least four separate properties, including 144 Spencer Street. Indeed, the other petitioners were demonstrated to have remitted rent to Spencer Realty for their use of the premises, which were shared by other unrelated commercial tenants. [E: 489-92]

Finally, and most importantly, there was simply no evidence that Spencer Realty exercised labor control over -- or shared employees with -- Three Sisters and Bedford.

Under the ALJ's analysis, affirmed by the Board and upheld by the D.C. Circuit on review, virtually any affiliated corporation could be held liable for the labor obligations of a sibling corporation, so long as one of the factors -- common ownership, deemed the least important -- is met.

Hence, too heavy a reliance upon the factor of common ownership -- a characteristic of many corporations -- can result in an impermissible intrusion by the Board

into corporate relations. Accordingly in light of the circumstances presented here, it is well within this Court's authority to clearly articulate the weight to be given each of four factors traditionally relied upon to establish single employer status. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182, 92 S.Ct. 383, 399 (1971) ("the legal standard to be applied is ultimately for the courts to decide and enforce").[15]

Conclusion

This petition for certiorari should be granted.

Respectfully submitted,

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On the Petition
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Kathryn A. McLaughlin, Esq.

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[15] The factors that enter into the Board's determination of alter ego status are similar to those considered in the context of a single employer analysis; *i.e.*, substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership between the old entity and its successor. *See Al Bryant, supra,* 711 F.2d at 553-54. Hence, for the same reasons, the Board's determination that Spencer Realty was an alter ego of the petitioners was also in error.

APPENDIX

Appendix A
Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1154 **SEPTEMBER TERM, 1994**

THREE SISTERS SPORTSWEAR CO.; BEDFORD CUTTING MILLS, INC.; THREE SISTERS APPAREL CORP.; METROPOLITAN SWEATER INDUSTRIES, INC.; UNITED KNITWEAR INDUSTRIES, INC.; SKYLIGHT FASHIONS, INC., D/B/A SKYLIGHT TRADING; 144 SPENCER REALTY CORP.; UNITED KNITWEAR INDUSTRIES, LTD.,

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Intervenor

No. 94-1169

Appendix A
Order of the United States Court of Appeals

INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITIONS FOR REVIEW AND CROSS APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before BUCKLEY, WILLIAMS, and RANDOLPH, *CIRCUIT JUDGES.*

JUDGMENT

These causes were considered on the record from the National Labor Relations Board and were briefed and argued by counsel. After full review, the court is satisfied that appropriate disposition does not warrant an opinion. See D.C. Cir. R. 36(b). On consideration thereof and substantially for the reasons set forth in the Board's decision herein, it is

ORDERED AND ADJUDGED by the court that the petitions for review be denied and the Board's cross-application for enforcement of its order be granted.

Appendix A
Order of the United States Court of Appeals

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

PER CURIAM

For the Court:

Mark J. Langer, Clerk

Filed: April 28, 1995

Appendix A
Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1154 **SEPTEMBER TERM, 1994**

Three Sisters Sportswear Co., et al.,

Petitioners,

v.

National Labor Relations Board,

Respondent

---

and Consolidated Case No. 94-1169

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentellle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Petitioners' Suggestion For Rehearing *In Banc* has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

Appendix A
Order of the United States Court of Appeals

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Filed: July 3, 1995

Appendix A
Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1154 **SEPTEMBER TERM, 1994**

Three Sisters Sportswear Co., et al.,

Petitioners,

v.

National Labor Relations Board,

Respondent

---

and Consolidated Case No. 94-1169

BEFORE: Buckley, Williams and Randolph, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing filed June 12, 1995, it is

Appendix A
Order of the United States Court of Appeals

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

Filed: July 3, 1995

Appendix B
Statutory Provisions

SECTION 8 OF THE ACT, 29 U.S.C. §158 (a) (1), (3) -- U N F A I R L A B O R PRACTICES

(a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) ' by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the

employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

SECTION 10 OF THE ACT, 29 U.S.C. §160(f) -- PREVENTION OF UNFAIR LABOR PRACTICES -- POWERS OF BOARD GENERALLY

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith

transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.